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FACEBOOK, INC.

12
13 **UNITED STATES DISTRICT COURT**
14 **SOUTHERN DISTRICT OF CALIFORNIA**
15

16 SAMBREEL HOLDINGS LLC; YONTOO LLC;
and THEME YOUR WORLD LLC,

17 Plaintiffs,

18 vs.

19 FACEBOOK, INC.,

20 Defendant.

21 CASE NO. 12-CV-00668-CAB-KSC

22 **DEFENDANT FACEBOOK, INC.'S**
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED EX PARTE
APPLICATION FOR LEAVE TO FILE
DECLARATIONS IN RESPONSE TO
PLAINTIFFS' REPLY IN SUPPORT OF
MOTION FOR PRELIMINARY
INJUNCTION

23 Judge: Hon. Cathy Ann Bencivengo
Hearing Date: August 9, 2012
Hearing Time: 10:00 a.m.
Dept.: Courtroom 2

1 Facebook, Inc. (“Facebook”) seeks leave to file two supplemental declarations in response to
 2 the new material Sambrell presented for the first time in its Reply in Support of Motion for
 3 Preliminary Injunction (“Reply”). The Court should grant the relief because Facebook would be
 4 unfairly prejudiced without an opportunity to address these new assertions. Plaintiffs do not object
 5 to Facebook submitting the supplemental declarations, and do not object to the Court’s consideration
 6 of those declarations. Decl. of Elizabeth L. Deeley ¶ 4.

7 Sambrell filed a motion for a preliminary injunction on March 19, 2012 (Doc. No. 3-1)
 8 (“Mot.”). Pursuant to this Court’s order (Doc. No. 37), Facebook filed a timely Opposition on July
 9 13, 2012. Doc. No. 41. Sambrell filed its Reply (Doc. No. 45) on July 27, 2012. With its Reply,
 10 Sambrell filed a Declaration of Matthew Adams in Support of Reply on Preliminary Injunction
 11 (Doc. No. 45-4) (“Adams Declaration” or “Adams Decl.”). The Adams Declaration contains a
 12 number of previously undisclosed assertions. Because Sambrell introduced these assertions for the
 13 first time in a declaration accompanying its Reply, Facebook was unaware of them, and was unable
 14 to address them in its Opposition.

15 For example, the Adams Declaration discusses a product called “PageCraze.” *See* Adams
 16 Decl. ¶¶ 3-15. He describes PageCraze as a “Facebook Application that operates on the Facebook
 17 Platform.” *Id.* ¶ 3. Sambrell asserts that PageCraze “operates in a fashion that is nearly
 18 indistinguishable from Facebook’s description of PageRage—except that it does not show
 19 advertising to its users” (Reply at 6:10-11), and suggests that Facebook nevertheless permits
 20 PageCraze to continue operating. *See id.* Facebook seeks to respond to Sambrell’s new assertions
 21 with the Second Declaration of Jud Hoffman in Support of Defendant’s Opposition to Plaintiffs’
 22 Motion for a Preliminary Injunction, attached hereto as Ex. 1.

23 The Adams Declaration also purports to provide an “analysis” of a Facebook toolbar.
 24 Sambrell asserts that the toolbar “modifies a user’s web browsing experience” by obscuring or
 25 pushing website content from the visible area of the browser window, and describes its behavior as
 26 somehow comparable to Sambrell’s PageRage product. Adams Decl. ¶¶ 16-23; *see also* Reply at 5-
 27 6. Facebook seeks to respond to these new assertions with the Supplemental Declaration of James E.
 28

1 Hung in Support of Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction,
 2 attached hereto as Ex. 2.

3 It would be unfair and unduly prejudicial for the Court to consider Sambrell's new purported
 4 evidence on Reply¹ without giving Facebook the opportunity to rebut these new materials. “[T]he
 5 district court should not consider the new evidence without giving the non-movant an opportunity to
 6 respond.” *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (citation and alteration omitted);
 7 *Pacquiao v. Mayweather*, No. 2:09-cv-2448-LRH-RJJ, 2010 WL 3271961, at *1 (D. Nev. Aug. 13,
 8 2010) (“[T]he court cannot consider new evidence provided in a reply when the other party does not
 9 have an opportunity to respond to the evidence.”) (citing *Provenz*, 102 F.3d at 1483); *see also, e.g.*,
 10 *Iconix, Inc. v. Tokuda*, 457 F. Supp. 2d 969, 975-76 (N.D. Cal. 2006) (citing *Provenz* and permitting
 11 defendants to file supplemental declarations in response to new evidence introduced in plaintiffs’
 12 preliminary injunction Reply). The *ex parte* relief Facebook seeks should therefore be granted.

13 **CONCLUSION**

14 Sambrell submitted new material with its Reply, depriving Facebook of an opportunity to
 15 respond to Sambrell's assertions. Facebook should be permitted to respond, and respectfully
 16 requests that the Court grant it leave to file the attached declarations in response to Sambrell's
 17 motion for a preliminary injunction.

18 DATED: August 6, 2012

Respectfully submitted,

19 KIRKLAND & ELLIS LLP

20
 21 */s/ Elizabeth L. Deeley* _____
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26 ¹ In moving for a preliminary injunction, Sambrell was required to “*serve[] and file[] with the*
 27 *notice of motion . . . all documentary evidence* which [Sambrell] intends to submit in support” of its
 28 motion. *See* Civil Local Rule 7.1(f)(2)(a) (emphasis added). A “district court need not consider
 arguments raised for the first time in a reply brief.” *Zamani v. Carnes*, 491 F.3d 990, 997 (9th Cir.
 2007).

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2012 I electronically filed the foregoing **DEFENDANT FACEBOOK, INC.'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF UNOPPOSED EX PARTE APPLICATION FOR LEAVE TO FILE DECLARATIONS IN RESPONSE TO PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION** with the Clerk of the court using the CM/ECF system which will send notification of such filing to the e-mail addresses registered, as denoted on the Court's Electronic Mail Notice List and will be sent by overnight mail delivery to the following:

Daniel Kotchen
KOTCHEN & LOW LLP
2300 M Street NW, Suite 800
Washington, DC 20037

DATED: August 6, 2012

By: /s/ Elizabeth L. Deeley
Elizabeth L. Deeley